in the stocks, or under lawful arrest, is said to be in prison, though he be not *infra parietes carceris*, and therefore this branch extendeth as well to a prison in law as a prison in deed. But the party must be actually imprisoned, for if the sheriff have a *capias* upon an indictment against A. and come to arrest him and is prevented from arresting him, this is not a felony, for A. never was in prison. And there must too be an actual forcible breaking of the prison by the prisoner himself; therefore if a
159 stranger break the prison without the *prisoner's procurement, or if the door be open and he goes out, or if the gaoler himself lets him out, this is no felony in him, but only a misdemeanor. But in R. v. Haswell, Russ. and Ry. 458, a prisoner, escaping from the house of correction, in getting over the wall threw down some bricks which were so placed on top of it as to give way when taken hold of, and here though the force was by no means intentional, it was held that the offence was complete. If the prison be set on fire, or struck by lightning, or in any like case of inevitable necessity not produced by the prisoner himself, he may break it to escape.[1] And no breach of a prison will amount to a felony unless the prisoner escape, 2 Inst. *supra*.

The words "have judgment of life or member" mean "shall be guilty of felony." If therefore the party were arrested for an offence, such as petty larceny, or homicide in self defence, &c., which do not require judgment of life or member, a prison breach by him is no felony. All such offences, however, are high misprisions, and punishable by fine and imprisonment, "for it cannot be thought the meaning of the Statute, in ordaining that such offences shall not be punished as capital ones, to intend that they shall not be punished at all," 2 Hawk. P. C. 128. A prisoner breaking prison, it will be remembered, is not bailable by a justice of the peace under 3 E. 1, c. 15, 1°, because it carries a presumption of guilt, and 2°, it is an additional offence.

The exception, "where the cause for which he was taken and imprisoned did require such judgment," is explained at length in 2 Inst. 590, from which it may be collected:

1°. If the offender is taken by a *capias* on an indictment, whether any felony were committed or not, the warrant is lawful and breaking prison by him is felony.

2°. If an innocent person be committed on a lawful *mittimus*, on such a suspicion of felony actually committed by some other person as will justify his imprisonment, although he be not indicted, he is within the Statute.

3°. If no felony at all has been committed, and the party be not indicted, his imprisonment is unjustifiable, and no *mittimus* will make him guilty within the Statute of breaking prison.

4°. If the *mittimus* be not in the form the law requires, though a felony were done, if there were no just cause of suspicion to arrest or imprison the party, his breaking prison will not be felony. And it may also be observed, that the offence for which he was committed must have been complete at the time, 1 Hale P. C. 19.

[1] Church of Holy Trin. v. U. S., 143 U. S., 457.